Nos. 17-1717, 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

DANIEL P. KEARNEY, JR.
Counsel of Record
DANIEL HARTMAN
KEVIN GALLAGHER
MICHAEL CARPENTER
KELLIE TRAVIS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
daniel.kearney@wilmerhale.com

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is an incorporated group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. Representing members of the legal profession and as adherents of a minority religion, *amicus* has a unique interest in ensuring that Establishment Clause jurisprudence nurtures, rather than stifles, the diversity of religious viewpoints and practices in the United States. To that end, *amicus* urges the Court to grant certiorari and repudiate both "offended observer" standing and the "reasonable observer" test for passive religious displays.

SUMMARY OF ARGUMENT

The decision below is a signal example of the misuse of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), in evaluating Establishment Clause claims regarding passive displays. The Fourth Circuit held that a 93-year-old memorial to local American servicemen who died in World War I must be destroyed or disfigured, on the ground that the shape of the memorial—a Latin cross—is a government "endorsement" of Christianity. This Court has instructed lower courts that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) (internal quotation marks omitted). Yet the Fourth Circuit gave

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person, other than *amicus* or their counsel, made any monetary contribution to the preparation or submission of this brief.

virtually no weight to historical practices and understandings, while placing dispositive weight on how its imagined "reasonable observer" would view the memorial.

This Court should grant certiorari to reject the lower court's *Lemon* analysis and to correct a troubling trend among lower courts of ignoring this Court's command to look to historical practices in interpreting the Establishment Clause. That trend reflects a fundamentally hostile stance toward the presence of religious symbols in public life—contrary to this Court's admonition that the Constitution does not "oblige government to avoid any public acknowledgement of religion's role in society" or "require eradication of all religious symbols in the public realm." *Salazar* v. *Buono*, 559 U.S. 700, 718-719 (2010) (plurality opinion). The Fourth Circuit's approach also poses particular risks to religious minorities, whose symbols and practices may more readily be viewed as "sectarian" to a "reasonable observer," regardless of historical practices and context. This case presents an opportunity for the Court to make clear that, under the Establishment Clause, a passive display that accords with historical practices and understandings is presumptively valid unless it is shown that the government's purpose is to coerce religious belief or practice by nonadherents.

In addition, this Court should grant certiorari to address the lower courts' expansive use of "offended observer" standing in Establishment Clause cases. Like many courts of appeals, the Fourth Circuit has held that persons who take offense at the mere sight of a religious symbol suffer sufficient injury-in-fact to bring an Establishment Clause claim. Nowhere else in the law is this type of injury sufficient to support Article III standing. Moreover, this Court long ago held

that there is no "special test" for standing in Establishment Clause cases, *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982)—yet lower courts continue to entertain "offended observer" claims. This Court should grant certiorari to clarify standing requirements in Establishment Clause cases, not least because expansive "offended observer" standing poses special risks for religious minorities, whose less-familiar symbols and practices may be conspicuous targets for "offended observers" seeking to eradicate any religious elements from the public realm.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE ESTABLISHMENT CLAUSE ANALYSIS OF PASSIVE DISPLAYS

This Court should grant certiorari to articulate a clear rule for Establishment Clause challenges to passive displays: when a government display uses religious symbols in a way that is consistent with "the rich American tradition of religious acknowledgements," *Van Orden* v. *Perry*, 545 U.S. 677, 690 (2005) (plurality opinion), the display is presumptively valid unless it is shown that the government's purpose is to coerce religious belief or practice by nonadherents. This case presents an opportunity to end years of jurisprudential uncertainty in this area and to stop efforts to misuse the Establishment Clause to purge religious symbols from the public square.

A. The Establishment Clause Is Properly Interpreted Based On Historical Practices And Understandings

This Court's recent Establishment Clause decisions have rightly moved away from application of the framework articulated in *Lemon*. In the 2005 *Van Orden* decision, a majority of this Court declined to apply *Lemon* in upholding a Ten Commandments display on the Texas State Capitol grounds. The plurality opinion explained that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected." 545 U.S. at 686 (plurality opinion); *see also id.* at 699 (Breyer, J., concurring) (declining to apply *Lemon* because "no single mechanical formula ... can accurately draw the constitutional line in every" Establishment Clause case). Instead, the plurality noted, the analysis should be "driven both by the nature of the [challenged action] and by our Nation's history." *Id.* at 686 (plurality opinion).

Cases after *Van Orden* charted a similar course in resolving Establishment Clause claims based on historical understandings and practices rather than on the *Lemon* framework. In *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, the Court did not cite *Lemon* at all, but instead conducted an extensive historical analysis to conclude that the Establishment Clause supported a ministerial exception to employment discrimination suits. *See* 565 U.S. 171, 182-185 (2012). This Court likewise eschewed *Lemon* in upholding the practice of an opening prayer at town council meetings in *Town of Greece*, noting that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 134 S. Ct. at

1819 (internal quotation marks omitted). The Court looked in particular to the history of legislative prayer and early congressional recognition that the practice "posed no threat of an establishment" of religion so long as no one was compelled to pray, "no faith was excluded by law, nor any favored," and the prayers "imposed a vanishingly small burden on taxpayers." *Id.*

These cases reflect the Court's abandonment of the "antiquated" and widely misapplied "endorsement test" under *Lemon*, in favor of "reference to historical practices and understandings." *Elmbrook Sch. Dist.* v. *Doe*, 134 S. Ct. 2283, 2284-2285 (2014) (Scalia, J., dissenting from denial of certiorari) (quoting *Town of Greece*, 134 S. Ct. at 1819 (internal quotation marks omitted)); *see also Town of Greece*, 134 S. Ct. at 1834 (Alito, J., concurring) ("[I]f there is any inconsistency between [a 'test' set out in the opinions of this Court] and ... historic practice ..., the inconsistency calls into question the validity of the test, not the historic practice.").

Despite the guidance of this Court's recent decisions, the Fourth Circuit below failed to conduct the required historical analysis, and instead applied the very "endorsement test" that this Court's cases have avoided. Pet. App. 12a.[2] The result is the *reductio ad absurdum* of Establishment Clause analysis under *Lemon*: a nearly 100-year-old memorial to forty-nine soldiers who lost their lives in World War I is rendered a "sectarian" display that "endors[es] Christianity ... not only above all other faiths, but also to their exclusion." *Id.* 26a.

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[2] All Pet. App. citations are to the Appendix to the American Legion's petition in 17-1717.

In reaching this conclusion, the court of appeals conducted no meaningful review of the history of cross displays or similar displays of religious symbols in memorials to U.S. war veterans, on military medals, or in commemorations of the First World War. It dismissed comparable displays at Arlington National Cemetery as "much smaller" than the Bladensburg Memorial and treated the display of the cross or the Star of David on individual headstones of the dead at Arlington as largely irrelevant—without pausing to consider how these instances might inform a proper analysis of "historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819; *see* Pet. App. 26a. The court similarly brushed aside evidence of the commemorative purposes of the Peace Cross as a symbol of sacrifice in the First World War. *See* Pet. App. 98a; *see also* H.R. Res. 15, 68th Cong. 1 (1924) (recognizing that crosses were "peculiarly and inseparably associated" with the American lives lost in World War I). Such historical evidence availed little against the casual observations of the lower court's "reasonable observer," who "could not help but note that the Cross is the most prominent monument in [Veterans Park] and the only one displaying a religious symbol." Pet. App. 26a. On that basis, the Court concluded that "a reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion." *Id.* 25a.

The Fourth Circuit's approach bears no resemblance to the analysis prescribed by this Court in *Town of Greece* and other recent Establishment Clause cases. It also exposes many comparable displays to constitutional challenge, not least because other courts of appeals continue to apply *Lemon* to passive displays that include religious symbolism. *See* American Legion Pet. 19. This Court should grant certiorari to clarify that

the proper analysis in such cases is not *Lemon*, but an analysis of historical understandings and practice as demonstrated in *Town of Greece*.

B. The Lower Court's "Reasonable Observer" Analysis Poses Particular Risks For Religious Minorities

The court of appeals' "reasonable observer" analysis poses particular challenges for the practices and symbols of religious minorities.

Under the lower court's analysis, the relatively uninformed perspective of the "reasonable observer" is more likely to view the display of symbols of religious minorities as "sectarian." Symbols of the Christian religion, such as Latin crosses, are common enough to mute their religious connotations. But the symbols and practices of minority religions are inherently less familiar: while the broader population may be aware of the Ten Commandments and the Menorah, it is likely less familiar with Jewish religious items and symbols such as the mezuzaah, sukah, or eruv. Due to unfamiliarity, these symbols may be more likely to be understood by a "reasonable observer" as a "sectarian" endorsement. The "reasonable observer" analysis thus tends to privilege familiar forms of religious symbolism and to feed on distrust, suspicion, and even hostility to religious minorities.

As such, the *Lemon* analysis as applied by the lower court runs counter to America's history of welcoming religious minorities. *See, e.g.*, Letter from George Washington to Newport Hebrew Congregation (Aug. 18, 1790), *in* 6 *Papers of George Washington* 285 (M. Mastromarino ed., 1996) ("All possess alike liberty of conscience and immunities of citizenship."). It fails to

recognize the particular concerns and perspective of religious minority communities who thrive in and among a majority culture, who may depend on reasonable accommodation from their employers and government, and whose religious symbols have a proper place in their communities' shared expressions of public meaning.

Indeed, Jews have faced an increasing number of legal and governmental attempts to constrain their religious practices. For example, before two recent Yom Kippurs, animal-rights activists have brought suits to curtail the killing of chickens in Day of Atonement rituals. *See, e.g.*, Complaint, *United Poultry Concerns* v. *Chabad of Irvine*, No. 16-01810 (C.D. Cal. Sept. 29, 2016); Complaint, *Animal Protection & Rescue League, Inc.* v. *Chabad of Irvine*, No. 30-2015-00809469-CU-BT-CJC (Super. Ct. Orange Cty. Sept. 11, 2015). Two years ago, a group of plaintiffs in Florida argued that granting a zoning variance to build a synagogue violated the Establishment Clause. *See Gagliardi* v. *TJCV Land Trust*, 889 F.3d 728 (11th Cir. 2018). Four years ago, New York attempted to fine Orthodox Jewish stores that posted a request for customers to dress modestly. *See* Berger, *No Fines for Stores Displaying a Dress Code*, N.Y. Times, (Jan. 21, 2014), https://www.nytimes.com/2014/01/22/nyregion/no-fines-for-stores-displaying-a-dress-code.html. And one year earlier, a New York City Orthodox Jewish probationary policeman had to seek the protection of federal court after he was forced to resign over department facial-

hair regulations.[3] *See Litzman* v. *New York City Police Dep't*, 2013 WL 6049066, at *1 (S.D.N.Y. Nov. 15, 2013).

Although these attempts to constrain Jews in their public religious practice have largely been resolved in favor of religious liberty, they reflect a troubling effort to purge religious symbolism and practice from the public realm. This secularizing force—this "brooding and pervasive devotion to the secular and ... passive, or even active, hostility to the religious," *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)—threatens the public religious practices of all religious minorities, not just Jews. A legal culture that views all presence of religion in the public square as a "sectarian" establishment is unlikely to see a value in preserving space for religious minority practices or to be moved by requests for accommodation.

These concerns are exacerbated by the essential arbitrariness of the "reasonable observer" test. As Justice Scalia observed, since its inception, the *Lemon* test has been "manipulated to fit whatever result the Court aimed to achieve." *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 900-901 (2005) (Scalia, J., dissenting); *see also Lynch* v. *Donnelly*, 465 U.S. 668, 699 n.4 (1984) (Brennan, J., dissenting) ("It seems the Court is willing to alter its analysis from Term to Term in order to suit its preferred results."). The court of appeals' analysis is thus both a jurisprudential muddle and a potential threat to religious minorities. The Court should take this opportunity to clarify its Establishment Clause jurisprudence.

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[3] Some believe the prohibition in Leviticus 19:27 against shaving extends to all forms of shaving, and thus have no means of closely trimming their facial hair.

II. "Offended Observer" Standing Is Inconsistent With Article III And Creates Risks For Religious Minorities

Before the Court can consider the substantive Establishment Clause question, it must also consider its jurisdiction and whether respondents had standing to sue in the first place.[4] *Amicus* believes that the question whether "offended observers" have standing to bring Establishment Clause claims also warrants certiorari. Allowing persons who claim merely to be "offended" to invoke the federal courts risks eroding the doctrine of standing and, like the Fourth Circuit's substantive analysis, threatens to impair the interests of religious minorities. *Amicus* therefore urges this Court to grant certiorari to address the question of whether mere "offended observers" possess Article III standing and to clarify standing requirements under the Establishment Clause.

In its decision below, the Fourth Circuit held that three individual plaintiffs had standing to sue simply because they "regularly encountered the Cross while driving" and were "offended" by its display.[5] Pet. App.

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[4] *Amicus* acknowledges that neither petitioner raised standing in its petition for certiorari. This Court has held that "if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties make no contention concerning it." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (internal quotation marks omitted); *see also Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (This Court is "obliged to examine sua sponte where standing has erroneously been assumed below.").

[5] The Fourth Circuit also held that the American Humanist Association had standing solely because some of its members "faced unwelcome contact with the Cross." Pet. App. 11a.

10a-11a. But this Court has made clear that individuals who take mere psychological offense to religious practices fail to satisfy the constitutional requirements for standing. *See, e.g., Valley Forge*, 454 U.S. at 485-486. "Offended observer" standing[6] undermines this Court's standing doctrine by threatening to turn every personal disagreement with a governmental display into a federal lawsuit. Further, the continued recognition of "offended observer" standing by lower courts poses particular challenges for religious minorities.

It is a "bedrock" principle that federal courts may only adjudicate actual cases or controversies. U.S. Const. art. III, § 2; *Valley Forge*, 454 U.S. at 471. Indeed, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (quoting *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997)).

The standing doctrine acts as a judicial check on when plaintiffs may bring suit in federal court under Article III's "case or controversy" requirement. *See Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016); *see also id.* at 1552 (Thomas, J., concurring). In essence, standing requires a plaintiff to establish an "injury in fact" that is "fairly ... traceable to the challenged [conduct] of the defendant," with a constitutionally sound Article III injury often defined as a "concrete and particularized" invasion of a legally protected interest, ra-

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[6] The term "offended observer standing" has been used to describe Article III standing premised upon litigants who feel offended by viewing a government-sponsored religious display. *See, e.g., Felix* v. *City of Bloomfield*, 36 F. Supp. 3d 1233, 1240 (D.N.M. 2014).

ther than an abstract injury that is merely "conjectural" or "hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

Standing is a constitutional requirement in all federal cases, including those involving the Establishment Clause, and there is no "special test" for standing in the Establishment Clause context. *Valley Forge*, 454 U.S. at 489 (rejecting view that "the business of the federal courts is correcting constitutional errors" and stating that this view "does not become more palatable when the underlying merits concern the Establishment Clause"). Yet standing predicated solely on being an "offended observer" has been recognized by lower courts only in Establishment Clause cases; in no other context does mere "offense" alone suffice for an Article III injury. *See, e.g.*, *Allen* v. *Wright*, 468 U.S. 737, 755-756 (1984) (rejecting standing based on "abstract stigmatic injury" in Equal Protection Clause context).

A. Lower Courts Continue To Rely On "Offended Observer" Standing Even Though It Has No Basis In This Court's Jurisprudence

This Court made clear in *Valley Forge* that standing based upon incidental, occasional exposure to a religious display in a public setting—*i.e.*, "offended observer" standing—is insufficient to support an Article III injury. 454 U.S. at 485-486 (holding that the "psychological consequence ... produced by observation of conduct with which one disagrees ... is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms").

Valley Forge observed that Article III would lose all meaning if standing were conferred by the mere "as-

sertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently." 454 U.S. at 483. This Court also emphasized that neither the degree of the plaintiffs' "offense," nor the mental pain "produced by observation of conduct with which [they] disagree[d]," would serve as a substitute for the showing of cognizable harm required for Article III standing. *Id.* at 485. It instead suggested that such cognizable harm might be found if plaintiffs were coerced by the government to practice a religion, such as being "subjected to unwelcome religious exercises or ... forced to assume special burdens to avoid them." *Id.* at 487 n.22.[7]

There are no "special exceptions" to standing doctrine for Establishment Clause cases, *Valley Forge*, 454 U.S. at 488, but that is exactly how lower courts have treated "offended observer" standing—as an exception that permits individuals who are merely angered or offended by religious displays to bring suit. Remarkably, nearly all courts of appeals now consider any "direct contact" with an "offensive" display sufficient for Article III standing, no matter how ephemeral the contact.[8]

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[7] Additional precedent from this Court supports the *Valley Forge* principle that "psychological consequence" resulting from merely observing a religious practice with which one disagrees is insufficient for an Article III injury. *See, e.g.*, *Steel*, 523 U.S. at 107 (holding that "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury"); *Allen*, 468 U.S. at 753-756 (holding that "abstract stigmatic injur[ies]" are "not judicially cognizable"); *cf. Town of Greece*, 134 S. Ct. at 1826 (emphasizing that mere "offense" does not violate the Establishment Clause).

[8] *See, e.g.*, *New Doe Child #1* v. *Congress of U.S.*, 891 F.3d 578, 585-586 (6th Cir. 2018); *American Humanist Ass'n* v. *Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243, 1250-1252 (10th Cir. 2017); *Freedom From Religion Found. Inc.* v. *New Kensington Arnold*

As a result, federal courts have seen and will continue to see a heavy docket of suits targeting public religious expression, symbolism, and practice.

The decision below is another erroneous decision in a line of "offended observer" cases, and demonstrates why the Court should take this opportunity to reject "offended observer" standing. In the decision below, the Fourth Circuit found that, to satisfy Article III standing requirements, it was enough that individuals who occasionally drove by the Peace Cross from an adjacent highway and viewed the cross from a distance in their cars were "offended" by the sight of the memorial. Pet. App. 10a-11a. The Fourth Circuit nevertheless ignored *Valley Forge* and reasoned that the plaintiffs' "unwelcome direct contact with a religious display that appears to be endorsed by the state is a sufficient injury to satisfy the standing inquiry." *Id.* 10a (internal quotation marks omitted).

The court of appeals' conclusion is inconsistent with this Court's precedent and reduces the standing inquiry in Establishment Clause cases to a rubber stamp. Some lower courts have recognized that this cannot be what the Court intended, and have called on the Court to address the issue. *See, e.g.*, *Awad* v. *Ziriax*, 670 F.3d 1111, 1121 (10th Cir. 2012) ("Since *Valley Forge*, the Supreme Court has not provided clear and explicit guidance on the difference between psychological con-

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Sch. Dist., 832 F.3d 469, 476-480 (3d Cir. 2016); *Jewish People for Betterment of Westhampton Beach* v. *Village of Westhampton Beach*, 778 F.3d 390, 394-395 (2d Cir. 2015) (per curiam); *Red River Freethinkers* v. *City of Fargo*, 679 F.3d 1015, 1023-1024 (8th Cir. 2012); *Catholic League for Religious & Civil Rights* v. *City & Cty. of San Francisco*, 624 F.3d 1043, 1052-1053 (9th Cir. 2010); *Pelphrey* v. *Cobb Cty.*, 547 F.3d 1263, 1279-1280 (11th Cir. 2008); *Books* v. *City of Elkhart*, 235 F.3d 292, 300-301 (7th Cir. 2000).

sequence from disagreement with government conduct and noneconomic injury that is sufficient to confer standing."). This Court should therefore clarify that, to satisfy the standing requirement of Article III, it is not enough that a plaintiff be an "offended observer" of a display that includes religious symbols.

B. "Offended Observer" Standing Harms Minority Religions Like Judaism

Aside from its lack of legal foundation, "offended observer" standing tends to harm members of religious minorities whose unfamiliar practices and symbols may be more likely to evoke offense or suspicion. While many Christian symbols and practices are a familiar feature of American life,[9] many Jewish practices are not and may still be considered unusual by many Americans. "Offended observer" standing thus threatens to subject religious minorities like Jews to a disproportionate number of legal challenges to their public religious practices, contrary to one of the very goals of the First Amendment. *See Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017) ("The Free Exercise Clause protects against laws that impose special disabilities on the basis of religious status.").

Expansive standing for Establishment Clause claims also has important consequences for accommodation of religious minorities, including Jews. Despite perceived tension between the Establishment Clause

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[9] For instance, the federal government recognizes Christmas Day as a federal holiday, but recognizes no other religiously based holidays. Office of Personnel Mgmt., *Federal Holidays*, https://www.opm.gov/policy-data-oversight/snow-dismissal-procedures/federal-holidays/ (last visited July 27, 2018).

and religious accommodation, this Court has long recognized the validity of state accommodation of religious practices. *See, e.g., Lee* v. *Weisman*, 505 U.S. 577, 627-628 (1992) (Souter, J., concurring) ("The State may 'accommodate' the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief." (citations omitted)). And this Court has long embraced government accommodation of religion, going so far as to praise it as in "the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 308, 313-315 (1952) (religious accommodation "respects the religious nature of our people and accommodates the public service to their spiritual needs"). Religious minorities therefore rely on the government's authority to provide tailored religious accommodations within the bounds of the Establishment Clause.

Practitioners of Judaism have sought government accommodations for a variety of religious practices, from physical movement on the Sabbath, to Kosher meals, to observance of Jewish holidays. A notable example is the eruv, which is a visible physical "ceremonial demarcation of an area" typically constructed by enclosing a section of a town by hanging wires on preexisting municipal utility poles. *See Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 152 (3d Cir. 2002). According to Jewish law, adherents may not carry objects—including keys, strollers, food, and children—outside their private residences on the Sabbath, but they may move freely within the area enclosed by an eruv, which notably facilitates their journey to and from synagogue on the Sabbath. In efforts to accommodate the Jewish religious minority, numerous munic-

ipal governments have approved construction of eruvs within their city limits. Levin, *Rethinking Religious Minorities' Political Power*, 48 U.C. Davis L. Rev. 1617, 1630 (2015) (noting that there are more than 130 eruvs in the United States).

Although eruvs are indistinguishable from standard utility wiring, *Tenafly*, 309 F.3d at 152, they have been viewed with suspicion by individuals who have challenged their constitutionality based on the injury of being "made uncomfortable" by the presence of an eruv. *Westhampton Beach*, 778 F.3d at 394 (finding standing based on allegation that the eruv was a "constant and ever-present symbol, message, and reminder to the community at large, that the secular public spaces of the Village have been transformed for religious use and identity" (internal quotation marks omitted)). Under "offended observer" standing, individuals who merely dislike the fact of a religiously-tinged display in their neighborhood—however inconspicuous—are able to sue for its destruction.

Followers of Judaism also require government accommodation to celebrate holidays like Hanukkah and Passover, as well as lesser known holidays like Purim. Public schools may excuse students from class on those holidays, and federal employees may likewise need to miss work on those days. This type of religious accommodation is often not required for those in the majority religion; for example, religious holidays like Christmas are already excused for all federal employees. Yet "offended observer" standing would appear to allow a government worker who is offended by a colleague's permitted absence from work for religious reasons to seek to enjoin continued accommodation. And litigation risk could discourage governments from providing such accommodations in the future.

The same concerns hold true for government accommodations of religious dietary restrictions, such as providing Kosher meals to Jewish servicemembers and Jewish attendees of state-sponsored conferences. The Defense Logistics Agency, for instance, provides Kosher and Halal meals to servicemembers who are members of the minority Jewish and Muslim faiths. *See Meal, Religious, Kosher/Halal*, http://www.dla.mil/TroopSupport/Subsistence/Operational-rations/relkoshhal/ (last visited July 27, 2018). Under the standing precedent of the Fourth Circuit and other courts of appeals, however, anyone attending a state-sponsored conference may have standing to bring a claim over the serving of matzah on Passover.

Finally, as in this case, "offended observer" standing is also an invitation to litigation against passive displays of religious symbols, including Jewish symbols. There are many such displays throughout the country. For example, various Holocaust remembrance memorials incorporate Jewish symbols like the Star of David, Torah scroll, or menorah. These include the Holocaust Monument in Columbia, South Carolina and the New England Holocaust Memorial in Boston. The latter consists of "six luminous glass towers, each reaching 54 feet high, and each lit internally from top to bottom," meant to invoke the candles of a menorah while representing the six million Jews who died in the Holocaust. *See* S.C. Memorial Park, https://discoversouthcarolina.com/products/823 (last visited July 27, 2018); *see also* The New England Holocaust Memorial, https://www.nehm.org/the-memorial/design-of-the-memorial/ (last visited July 27, 2018). In addition, Stars of David are engraved on the tombstones of fallen American soldiers in Arlington National Cemetery.

Expansive Establishment Clause standing, in the guise of "offended observer" claims, works against all such reasonable attempts to accommodate religious practice and symbolism in our shared public life. Far from vindicating Establishment Clause principles, "offended observer" standing runs counter to them, for it legitimizes the assumption that religious symbols or accommodations give offense and are a departure from the norm—from the accepted, "secular" character of the public square. But there is no basis for that assumption: nothing in the Constitution "oblige[s] government to avoid any public acknowledgement of religion's role in society" or "require eradication of all religious symbols in the public realm." *Buono*, 559 U.S. at 718-719 (plurality opinion).

CONCLUSION

This Court should grant certiorari and reverse.

Respectfully submitted.

DANIEL P. KEARNEY, JR.
Counsel of Record
DANIEL HARTMAN
KEVIN GALLAGHER
MICHAEL CARPENTER
KELLIE TRAVIS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
daniel.kearney@wilmerhale.com

JULY 2018